From: Scott Bolden
To: Microsoft ATR
Date: 1/24/02 11:24am
Subject: Microsoft Settlement

TUNNEY ACT COMMENT ATTACHED

I have attached my comments on the Microsoft Settlement to this email. For your convenience, I have attached the same file in two different formats. The first format is .rtf, which is readable in most word processors. The second format is plain ASCII, .txt, which should be readable in all word processors.

Thanks,

Scott Bolden

TUNNEY ACT COMMENT ATTACHED

January 23, 2002

From: Scott Bolden
3902 5th Street N Apt. 3
Arlington, Virginia 22203

To: Judge Coleen Kollar-Kotelly
United States District Court for the District of Columbia

Antitrust Division
Department of Justice

Re: Tunney Act Comments for the Microsoft Settlement Agreement
U.S. District Court, District of Columbia Civil Action No. 98-1232 (CKK)

My name is Scott Bolden and I am writing in my own capacity as a user of Microsoft Corporation's ("Microsoft") Operating System ("OS") products, as a consumer, and as a citizen. I believe the Revised Proposed Final Judgment in United States v. Microsoft Corp. ("the agreement") should be rejected because it is fundamentally flawed and usurps the remedies it was intended to provide. First, the agreement contains several vague provisions that are open to interpretation and will likely be exploited by Microsoft. Particularly troubling is the fact that the provisions are so broad that they allow Microsoft to define and control the terms of the agreement. Second, Microsoft has a proven history of violating the antitrust laws and a prior agreement with the Justice Department. Finally, the agreement takes few steps to restore competition and may significantly hinder true competition in the operating system market. The proposed agreement does not punish Microsoft, does not restore competition, and harms consumers. Accordingly, I urge the court to reject the agreement in its entirety.

I. The Agreement is Vague and Gives Too Much Power to Microsoft

The agreement is lacking in several critical aspects. Although a thorough analysis of this agreement is beyond the scope of this comment, I have highlighted a few areas of general and one area of specific concern.

The first area of general concern is the agreement's provisions that include the clause: "...for the sole purpose of interoperating with a Windows Operating System Product...." This clause is extraordinarily restrictive, especially considering that Microsoft has violated the Sherman Antitrust Act in the OS-market for x86-architecture computers. In essence, Microsoft will be "forced" to divulge key information (such as APIs) to the designers of application programs that use Microsoft's OSes. Microsoft already provides much of this information to application designers in an effort to encourage the creation of a wide variety of applications for its OSes. The restrictive clause merely sanctions conduct beneficial to and already performed by Microsoft, and does not aid competitors and consumers. Therefore, this clause should be removed.

Another troubling clause that is often employed is: "...specified in the Windows documentation...particular types of functionality...." See III.C.1; III.H.1. As opposed to the previously discussed clause, this open-ended clause is virtually meaningless. Allowing

Microsoft to restrict the agreement's remedies based on its own documentation gives Microsoft the power to control the terms of the agreement.

Although I do not disagree with the general provisions regarding the Technical Committee, see IV, I do disagree with the provisions that eschew public disclosure in favor of nondisclosure. The agreement is drafted to avoid all public disclosure throughout each stage of enforcement. This is an unconscionable result, and effectively allows a company who acted against the public interest to shield any future misconduct from the public. At the very least, the reports of the Technical Committee should be available to the public for review.

The time periods listed in the agreement are a final area of general concern. The five-year length of the agreement is wholly inadequate to remedy Microsoft's anticompetitive behavior. See V.A. In addition, the "one-time extension of [the agreement] of up to two years" is laughable. V.B. Microsoft does not even have to release any APIs before 12 months from the entry of this agreement, see III.C.1, so this agreement is effectively a four-year agreement. The effective length of the agreement is curtailed further by the generous (and undefined) provision that gives Microsoft a "reasonable opportunity" to fix any violations of the agreement, before submitting to a lengthy closed arbitration process for continued violations. IV.A.4. A more appropriate remedy would be to enlarge the length of this agreement to seven years, and remove the limitation on the number of extensions available in the future "when the Court [finds] that Microsoft has engaged in a pattern of willful and systematic violations." V.B.

The area of specific concern is section III.J.2 of the agreement. This section allows Microsoft to condition the release of information to a licensee that, inter alia:

> (b) has a reasonable business need for the API, Documentation or Communications Protocol for a planned or shipping product, (c) meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business...

Id. (emphasis added)
Again, this section allows Microsoft to control the terms of the agreement. By allowing Microsoft to define the phrases "reasonable business need" and "meets reasonable, objective standards," this agreement forecloses competition in the OS market by denying information to Microsoft's only potential competitor: the open-software community.

II. Microsoft Has a History of Anticompetitive Behavior

Microsoft has an anticompetitive history, and its past conduct evidences a disregard for the law. The Government first filed suit against Microsoft for antitrust violations in 1994, obtained a consent decree against the company in 1995, and filed suit against Microsoft for violations of the consent decree in 1998. Microsoft's misconduct during the trial court phase is legendary (but was overshadowed by the conduct of Judge Jackson). In addition, representatives of the company have often demonstrated an attitude that borders on contempt for the law and the judicial system. This past conduct is not cause alone for punishing Microsoft, but it compels caution and strict oversight in enforcing antitrust remedies.

III. The Agreement Harms Competition

Finally, and most importantly, the flaws of the agreement and Microsoft's actions in and out of court mandate the view that this agreement will harm competition. Many of the agreement's provisions give Microsoft too much control, permitting the company to avoid

disclosure, act anticompetitively, and harm competitors and consumers. The Court of Appeals warned against this result when it stated: "[I]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will particularly in industries marked by rapid technological advance and frequent paradigm shifts." Unfortunately, the proposed agreement permits Microsoft, a proven monopolist, to continue its anticompetitive behavior against third-party OSes and middleware. Accordingly, I urge the Court to reject this agreement in its entirety.

Sincerely,

Scott Bolden